

### **REMARKS**

The present application has been considered in view of the Final Office Action that was mailed on July 9, 2008. Claims 10-28 are currently pending. By the present Amendment, Applicants have amended independent claims 10 and 25. Applicants respectfully submit that the amendments to independent claims 10 and 25 do not introduce any new matter and are fully supported by the specification, and that claims 10-28 are allowable over the references of record as presented herein. In light of these amendments and the following remarks and argument, Applicants respectfully request reconsideration and allowance of claims 10-28.

Claims 10-16, 19, and 21-28 were rejected under 35 U.S.C. §102(b) over U.S. Patent No. 5,456,400 to Shichman *et al.* (hereinafter "Shichman"). However, Applicants respectfully submit that Shichman fails to disclose each and every element recited in claims 10-16, 19, and 21-28 as presented herein.

As amended, independent claims 10 and 25 each recite an apparatus for substantially closing a vascular opening in a vessel that includes "a housing," and tissue engaging members that are "longitudinally and reciprocally movable relative to said housing between a retracted position and an advanced position."

Shichman relates to an apparatus for applying surgical fasteners, (*see* col. 1, lines 64-65), represented generally by reference character 10 in FIG. 1 below, wherein each clip 10 includes a back portion 15 and a pair of legs 11. (*See* col. 2, lines 45-47). In one embodiment, seen below in FIGS. 10-12, the apparatus includes a pusher member 140 for individually advancing clips 10 through a cartridge. (*See* col. 3, lines 36-37).

The pusher 140 includes a pair of distal projecting arms 180 which each have a pre-piercer 182 pivotally attached thereto. (See col. 5, lines 11-13).

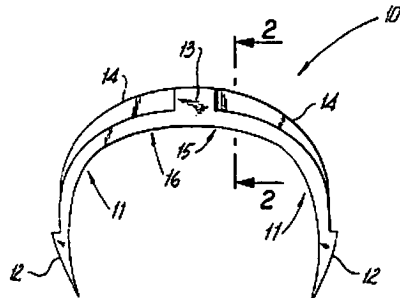


FIG. 1

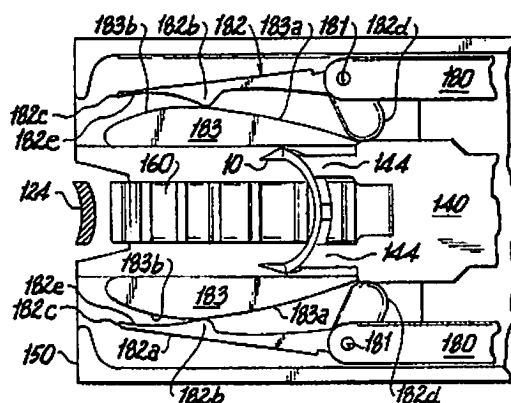


FIG. 10

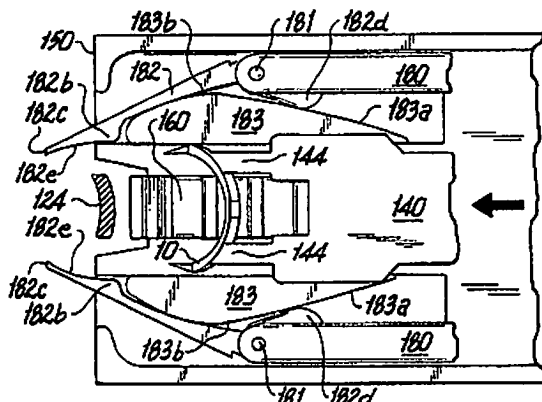


FIG. 11

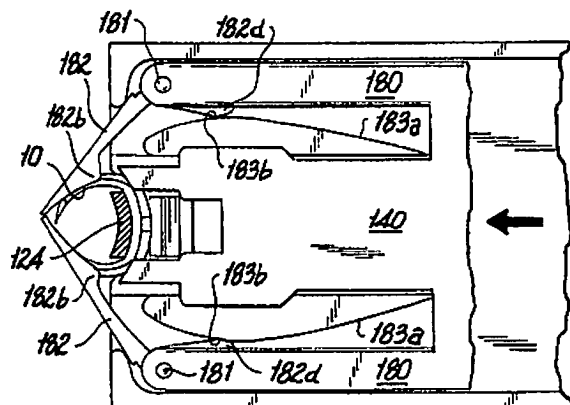


FIG. 12

In the Final Office Action, the legs 11 of the clips 10 were characterized as the “tissue engaging members” recited in the claims, and it was asserted that the legs 11 are movable from a retracted position to an advanced position. However, Shichman states that the clips 10 are advanced by the pusher member 140 until they reach an anvil 124, (*see* col. 4, lines 19-20), at which time the anvil 124 effectuates formation and deployment of the clips 10 with tissue. (*See* col. 3, lines 18-20). Thereafter, the pusher 140 is withdrawn rearwardly and positioned behind the next clip 10 in the line. (*See* col. 4, lines 27-29). Accordingly, the clips 10 are movably only in the forward direction shown in the in transition between FIGS. 10-12 above, i.e., towards the anvil 124, and are never returned to the initial position seen above in FIG. 10. To the contrary, forming and securing the clips 10 within the tissue prevents their return to the initial position. In fact, returning the clips 10 to the initial position would frustrate their intended placement, and thus, the purpose of the Shichman apparatus, i.e., the application of surgical fasteners to tissue. (*See* col. 1, lines 64-65). Therefore, Applicants respectfully submit that Shichman fails to disclose tissue engaging members that are “longitudinally and reciprocally movable . . . between a retracted position and an advanced position,” as recited in amended independent claims 10 and 25, or even suggest that such would be desirable.

For at least this reason, *inter alia*, Applicants respectfully submit that Shichman fails to disclose each and every element recited in amended independent claims 10 and 25, and consequently, that amended independent claims 10 and 25 are allowable over Shichman under 35 U.S.C. §102(b). As claims 11-16, 19, 21-24, and 26-28 depend either directly or indirectly from amended independent claims 10 and 25 and include each

element recited therein, for at least the reasons that amended independent claims 10 and 25 are allowable over Shichman under 35 U.S.C. §102(b), *inter alia*, Applicants respectfully submit that claims 11-16, 19, 21-24, and 26-28 are also allowable over Shichman under 35 U.S.C. §102(b).

Claims 17 and 18 were rejected under 35 U.S.C. §103(a) as being unpatentable over Shichman in view of U.S. Patent No. 6,063,085 to Tay (hereinafter "Tay"). Applicants respectfully submit, however, that the combination of Shichman and Tay fails to suggest each and every element recited in claims 17 and 18 as presented herein.

In the Final Office Action, it was acknowledged that Shichman fails to disclose an attachment device adapted to transmit thermal energy through application of an energy source thereto, thereby fusing the vascular tissue surrounding the vascular opening, and Tay was relied upon disclosure of that concept.

As previously discussed, Shichman fails to disclose or suggest each and every element recited in amended independent claim 10. Assuming, *arguendo*, that the characterization of Tay proffered in the Final Office Action is accurate, incorporating the attachment device adapted to transmit thermal energy purportedly disclosed therein would fail to remedy the aforescribed deficiencies in Shichman.

Accordingly, and for at least this reason, *inter alia*, Applicants respectfully submit that the combination of Shichman and Tay fails to suggest each and every element recited in amended independent claim 10, and therefore, that amended independent claim 10 is allowable over Shichman in view of Tay under 35 U.S.C. §103(a). As claims 17 and 18 depend indirectly from amended independent claim 10 and include each element

recited therein, for at least the reasons that amended independent claim 10 is allowable over Shichman in view of Tay under 35 U.S.C. §103(a), *inter alia*, Applicants respectfully submit that claims 17 and 18 are also allowable over Shichman in view of Tay under 35 U.S.C. §103(a).

Claim 20 was rejected under 35 U.S.C. §103(a) over Shichman. It was argued in the Final Office Action that it is well known in the art to use spring members with actuators to bias the jaws of a device into either an open or close position, and that it would have been obvious to one having ordinary skill in the art to have modified the device described in Shichman to include a spring.

As previously stated, Shichman fails to disclose or suggest each and every element recited in amended independent claims 10. As claim 20 depends indirectly from amended independent claim 10 and includes each element recited therein, for at least the reasons set forth above regarding the allowability of amended independent claim 10, *inter alia*, Applicants respectfully submit that claim 20 is allowable over Shichman under 35 U.S.C. §103(a).

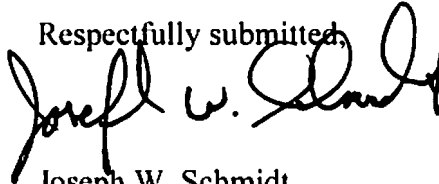
Claim 10 was also rejected on the ground of non statutory obviousness-type double patenting as being unpatentable over claim 1 of U.S. Patent No. 6,248,124. As stated previously in an Amendment dated November 26, 2007, Applicants will file a suitable terminal disclaimer upon the indication that claim 10 is otherwise allowable.

In view of the amendments to the claims effected herein, and the foregoing remarks and arguments, Applicants respectfully submit that claims 10-28 are

patentably distinguishable over the references of record, and are in condition for allowance. Accordingly, Applicants respectfully requests allowance of the above-identified application.

Should the Examiner have any questions concerning this Amendment, or feel that an interview would further prosecution, she is sincerely invited to contact Applicants' undersigned attorney at her convenience.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Joseph W. Schmidt", written over the typed name.

Joseph W. Schmidt  
Reg. No. 36,920  
Attorney for Applicant(s)

***Carter, DeLuca, Farrell & Schmidt, LLP***  
445 Broad Hollow Road - Suite 420  
Melville, New York 11747  
Tel.: (631) 501-5713  
Fax: (631) 501-3526

**Send correspondence to:**  
Chief Patent Counsel  
Covidien  
60 Middletown Avenue  
North Haven, Connecticut 06473

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